



OccasionalPaper 43

Soft Power and international rule-making

Frank Vibert

Liberales Institut

JEDER MENSCH BRAUCHT
FREIHEIT, UM SEINE
ANLAGEN UND FÄHIGKEITEN
ENTFALTEN UND
VERWIRKLICHEN ZU KÖNNEN.
DIESE FREIHEIT IST
VORALLES NÖTIG, UM
WISSENSCHAFTEN, STAGNIERT
DIE WIRTSCHAFT,
GÜNSTIGES LEBEN BRAUCHT
FREIHEIT GENAUSO, WIE DER
KÖRPER DIE LUFT ZUM ATMEN.

Imprint:

Editor

Liberal Institute

Friedrich-Naumann-Stiftung für die Freiheit

Karl-Marx-Straße 2

D-14482 Potsdam

Phone +49 3 31.70 19-2 10

Fax +49 3 31.70 19-2 16

libinst@fnst-freiheit.org

www.freiheit.org

Production

COMDOK GmbH

Office Berlin

Reinhardtstraße 16

D-10117 Berlin

2008

Soft Power and international rule-making

Frank Vibert

Paper presented at the International Colloquium „Global Freedom?
The Future of International Governance“ organised by the Liberal Institute of the
Friedrich Naumann Foundation, Potsdam, Germany 9–11 November 2007

Contents

Introduction. – Why should liberals be concerned?	5
Delineating the world of soft power.	5
The growth of soft techniques of rule-making.	9
The problem of accountability.	11
Developing safeguards. Democratisation or rules?	13
Conclusion	14
Abbreviations	16
Selected references	17

Introduction - Why should liberals be concerned?

I would like to start this paper by asking why it is that liberals should be concerned about the exercise of soft power in international relations. In general we are likely to favour the use of soft power. We prefer the idea of persuasion to the use of force. However the reason why we should be concerned is that the exercise of soft power includes the use of international law-making and rule-making mechanisms that have a material impact on individuals, but the mechanisms themselves are often opaque and obscure.

This obscurity of the process and the venue often makes it impossible in practice for the individual:

- to know the source of the law,
- or to influence the law-making process,
- or to obtain redress if adversely affected,
- or to sanction those who make bad rules.

In other words it is a process that disenfranchises and allows for the arbitrary exercise of power.

My theme therefore is a simple one. It is that the problems arising from the exercise of soft power in the context of international rule-making need to be recognised. International rule-making needs to be contained within a rules-based system consistent with democratic forms of government at the national level. The rule-makers themselves need to observe appropriate rules in what they do. We need rules to apply to the rule-makers.

What I plan to do here is first to outline briefly the world of soft power – dealing with its definitions, its key characteristics and its varieties. Secondly, I would like to turn to the reasons for the growth in the use of soft power and thirdly, I will point out the problem of holding those who make the rules to account and the different approaches that can be taken to strengthen accountability.

Delineating the world of soft power

Defining soft power

The broad definition of soft power comes from international relations theory and refers to accomplishing international aims through persuasion and co-optation rat-

her than through the use of armed force or other forms of coercion such as the use of economic sanctions. Sometimes the definition is used more narrowly and is limited to the cultural or ideological means of obtaining an objective. Conversely, sometimes a broader definition is used to include payments (such as foreign assistance) or trade concessions as part of the range of non-coercive techniques.

In this paper I will focus particularly on soft power in the sense of making international rules of behaviour as a way of avoiding the use of coercive means such as economic sanctions and the use of force. In this rule-making context you will sometimes encounter the use of the phrase 'soft governance'. This refers to the use of soft instruments for coordination such as the 'Open method of Coordination' used in the EU's Lisbon process.

In one sense, both terms – 'soft power' and 'soft governance' – are slightly misleading in the context of rule-making. This is because in this context both soft and hard law-making techniques are employed. The Lisbon process is itself a good example of the use of hard as well as soft techniques because it relies not only on soft techniques such as benchmarking and recommendations but partly also on hard law – notably EU competition law. I define soft power to include both hard and soft law.

Soft power in context of international rule-making and coordination


In talking about international rule-making and coordination I will in fact distinguish between two broad means of exercising soft power. The first involves soft mechanisms. This means the use of informal institutional mechanisms and/or non-binding legal forms that nevertheless have hard effects at both the national and individual levels. The second involves hard mechanisms that use formal treaty based international organisations (such as the Bretton Woods organisations) and employs legally binding commitments and means of implementing or enforcing their actions (The WTO would be an example).

As I will describe below, these techniques tend to be mixed and matched. But when examining the mechanisms of soft means of international action, three defining characteristics are evident. Firstly, there is a reliance on networks rather than treaty based international institutions. Secondly, the networks deploy recommendations or guidelines or principles rather than laws or treaties (for example one network organisation, FSF, distinguishes between 'Principles', 'Practices' and the 'Methodologies/guidelines' it promulgates). Thirdly, the techniques blend together a combination of public and private processes and rule-makers. (For example the International Accounting Standards Board is structured as a private trust and its

recommendations are then taken up by the official accounting bodies such as the Financial Reporting Council in the UK or the Securities and Exchange Commission in the US).

The varieties of soft power

What makes the world of soft power difficult to pin down when it comes to international rule-making is precisely this mixing of hard and soft techniques of rule-making. In order to illustrate the mix of institutions and techniques involved I offer the following examples:

1. Hard institutions/hard technique: 

A treaty-based organisation (WTO) enters into and enforces binding international trade agreements with a formal mechanism for resolving disputes.

2. Hard institutions/soft technique: 

Treaty obligations entered into with a treaty-based organisation that spawns soft methods of implementation. (WHO Framework Convention on Tobacco possibly relying on guidelines or recommendations for implementation).

3. Soft institutions/hard technique: 

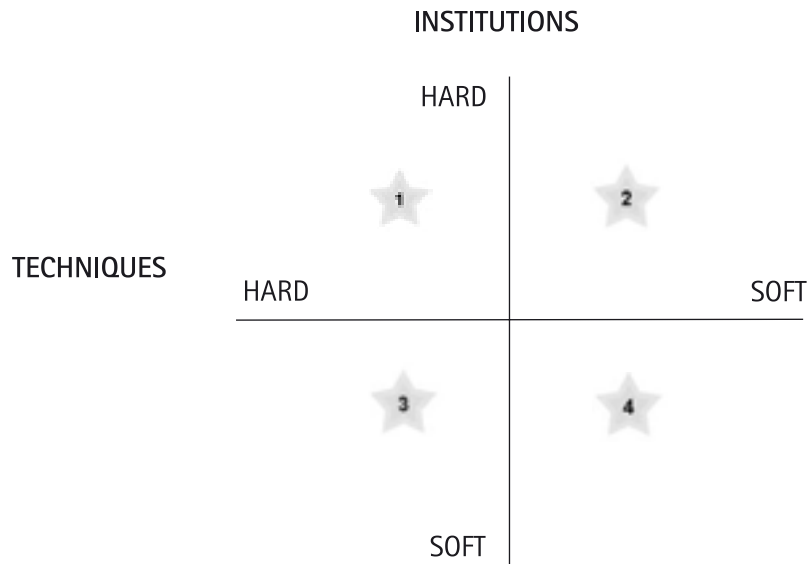
Networks that sponsor hard domestic law (FATF) (IASB).

4. Soft institutions/soft technique: 

Networks that promote soft methods of implementation (IOSCO & codes of conduct for rating agencies).

The theoretical possibilities can be shown in the form of a simple quadrant. Each of the illustrations I have given fall into a different quarter.

Chart A: Varieties of rule-making



The Choice.

These examples provoke the question as to what determines the choice of venue and instrument in the making of international rules. Why should governments prefer one part of the quadrant to another? I do not want to digress too far from my main theme and I would simply suggest their need to weigh two types of consideration.

First, the factors that go into the framing of international rules may affect the choice of institution (for example, club size or the degree of like-mindedness of club members may be among the factors involved). The second consideration that affects the other side of the equation – the choice of instrument – involves what is referred to as the 'logic of implementation'. What this means is, that different types of implementation situations will call for different types of instruments. If serious doubts exist as to whether a rule will be implemented in practice, a hard mechanism may be required; in other cases softer instruments for management or persuasion may be sufficient. The choice of institutional venue and instrument thus reflects a mixture of framing and implementation considerations.

The growth of soft techniques of rule-making

After this outline of the varieties of international rule-making, I would like to turn now to the reasons for the growth of soft techniques of rule-making. The reasons can in my view be brought together under the heading of the desire of governments to reduce the transaction costs of international rule-making. In some cases these cost savings are costs in a literal sense and in other cases they stand for reducing other kinds of complexity in rule-making.

It is useful to distinguish between three main kinds of transaction costs: administrative, informational and what I call 'coordination' costs.

Administrative costs:

As far as administrative costs are concerned soft techniques can reduce costs in a literal sense. Using networks of national officials (such as FATF) reduces institutional costs. The set-up costs of treaty-based organisations are avoided as are also the running costs of permanent bureaucracies. Soft forms of rule-making may also reduce negotiation costs because it may be easier to reach a consensus on soft measures. Soft techniques may also reduce implementation costs because the details of transposition can be left to each jurisdiction.

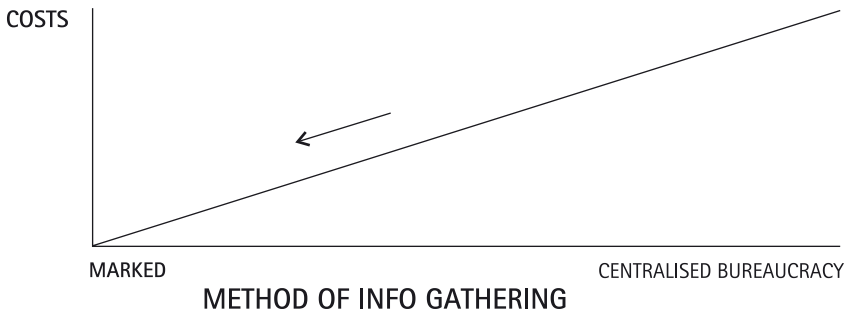
Reducing these kinds of administrative costs is significant but probably not decisive in themselves.

Informational costs:

Another and more important class of costs that can be reduced through soft techniques of international law-making concern various types of informational costs.

Firstly, networks and the co-option of private sources of information (such as those private sources mobilised by IASB and IOSCO) provide information gathering efficiencies. This is illustrated in the chart below, showing the market as the most efficient institution for gathering information and centralised bureaucracy as the least efficient. The use of networks and private bodies drives costs to the more efficient end of the curve.

Chart B: Information Gathering Costs



Secondly, networks are also likely to be more efficient than permanent bureaucracies in linking up with epistemic communities conversant with the latest scientific and technical knowledge. (IPCC is an example in which the network mobilises the knowledge while the host institutions, WMO and UNEP, provide the venue).

Thirdly, an important motivator in the use of soft techniques in a national context is the desire of those being regulated to have legal certainty. With techniques such as guidelines, comfort letters, or guidance notes, the regulatory body provides a 'safe harbour'. Similar techniques, such as letters or memorandums of understanding, can reduce the costs of legal uncertainty in international transactions.

Coordination costs:

Finally, soft international rule-making can reduce what I call coordination costs. The first of these is the cost of dealing with an agenda shift in areas of international action. This is recognised in the area of international trade where there has been a shift from dealing with tariff barriers to non tariff barriers including regulatory barriers. The key difference is that non tariff barriers enter into what traditionally has been seen as the domain of domestic policy. The further international rule-making becomes involved in this new agenda and touches on core domestic policies, the more likely it is that soft techniques will be preferred. A similar evolution can be seen at work within the EU.

The need to co-opt the private sector in rule-making can also be viewed as a coordination issue between the public and private sectors. It would be difficult

to imagine effective international accounting standards being developed without IASB or securities standards without IOSCO. The private sector is also often needed in the implementation of rules. Various forms of co-regulation or 'monitored self-regulation' also provide ways of reducing implementation costs.

Another important way of reducing coordination costs can be observed in the development of international rule-making through the use of groups of like-minded parties rather than through the use of traditional international organisations with their universal membership that is divided in its interests and approaches to policy. A clear symptom of this can be seen in the field of trade where there seems to be a shift away from mechanisms such as the Doha Round towards bilateral free trade agreements (FTAs).

The main point about these ways of reducing transaction costs is that, in their entirety, they can be seen as providing a huge incentive to move in the direction of new forms of international rule-making. Moreover these incentives are not going to go away. If anything, they are going to become even more compelling in the future.

This leads me to the question of what, if anything is wrong with these developments.

The problem of accountability

The institutions wielding power in international rule-making can be criticised both on the grounds of lacking legitimacy and on the grounds of operating in an unaccountable way. Legitimacy and accountability are closely related but not identical concepts. Legitimacy concerns the justification of powers and accountability involves the exercise of powers. For the purposes of this discussion I would like to focus on their accountability – the way in which power is exercised – in the making of both soft and hard international rules and the mix.

There are in my view two general reasons why people are concerned about the lack of accountability in international rule-making. One reason is that the processes seem to lack transparency and this lack erodes all dimensions of accountability. The other is that soft international laws are often seen as the precursor to hard mandatory and binding laws – a process sometimes referred to as 'the shadow of hierarchy'. Yet, whereas within a state, formal law-making is subject to various checks and balances, this netherworld of international soft law seems to operate

without such checks and balances. In addition to these general reservations there are more specific concerns.

Classic democratic theory distinguishes between three dimensions of accountability. Those wielding power need to be answerable and give reasons for what they do; they need to keep within defined terms of reference and there needs to be the possibility of sanctioning them if they overstep their bounds or operate without answering to anyone or anything. These distinctions help us see why there is concern about the accountability of international rule-makers.

Answerability (The need to give public reasons)

As far as their answerability is concerned the key critique is that the reasoning and evidence base employed to justify measures is not subject to adequate ex ante scrutiny. There is a lack of impact assessment that is a key tool for collecting market evidence. In addition, epistemic standards such as the need for independent peer review or the replicability of scientific reasoning is often absent. The IPCC can be seen as setting new standards in this area but it has also been criticised for lacking rigour. If the reasoning behind proposed measures is not exposed to independent scrutiny then there is a risk that bias will creep in and epistemic communities or interest groups or NGOs will distort the rule-making process.

Terms of reference (Keeping the rule-makers within clear bounds)

As far as keeping rule-makers to defined terms of reference is concerned public choice theory tells us, that permanent bureaucracies will develop their own objectives. This is even more likely to occur at the international level where parliamentary scrutiny is absent, government shareholders have conflicting objectives and the organisations have their own biases including being advocates of the cause they espouse. Networks have more cohesive controlling groups or governments but they possess their own biases, write their own terms of reference, and operate largely out of sight and certainly outside parliamentary scrutiny.

Sanction

Finally the application of sanctions in respect of international rule-making is a difficult and clumsy process. In theory such means exist, for example withholding budget support. But in practice such means are difficult to apply when there are mixed constituencies and mixed motives. Attempts to discipline UN organisations might for example be represented as showing an anti-UN attitude and not worth the diplomatic cost.

In short, the charge is that international rule-makers follow unclear standards and disciplines, operate without clearly defined terms of reference and there is a lack of means to sanction any transgressions. There are doubtless exceptions to this charge sheet. Bodies that operate in the financial sphere such as IOSCO or FSF are well aware that a misstep can be hugely damaging and their reports are often thorough, respect market evidence and are put out for consultation and comment. IASB aims at transparency. Other organisations may not always be so disciplined.

Developing safeguards – Democratisation or rules?

In looking at how to remedy this situation two different avenues are open. One is to look for some kind of democratisation of global rule-making. The other is to look to a stronger rules-based framework.

Democratisation

Democratisation at the global level is vulnerable to the criticism that it is 'unrealistic' and some consider that it is also undesirable at this point. Alternatively there are those who suggest that we should look below the level of states, at transnational mechanisms, and rely on the kinds of self-discipline brought to the table by the networks currently making the rules. This is vulnerable to the criticism that we are condoning elitism rather than democracy. It also makes a questionable assumption that the disciplines that operate within national systems also operate in the same way at the international level.

A less direct approach to democratisation places the emphasis on the need to democratise states. This would have a number of advantages such as increasing the degree of like-mindedness among the rule-makers and make it more likely that they would respect the kind of rule-making procedures that are observed within democracies. It would also increase the likelihood that the rules they make are indeed consonant with the interests of democracies themselves and with democratic expression within them.

Historically, liberals have always qualified their support for democracy via the ballot box by stressing the need for 'democracy within the rules' rather than viewing democracy as what the electorate wants. Given the difficulties of introducing the ballot box at the global level it is to the rules that we should also look. Moreover, with the exception of the United Nations which has a clearly political mandate, the rule-making bodies belong to the world of the unelected rather than

the elected and their legitimacy depends on the principles and procedures they follow in going about their business. The aim should be to have in place rules applying to the international rule-makers that provide a discipline equal to the kinds of procedures that apply to unelected bodies within a democratic country.

Components of rules-based approach

Within democratic countries it is increasingly accepted that unelected bodies must follow high standards of ex ante impact review to ensure that proposed measures are supported by evidence. In the United States these procedures have recently been extended explicitly to soft measures in the form of departmental guidance notes. Equally in the United States there is a requirement that any measure that is based on a scientific assessment must have that science base independently peer reviewed. The replicability of assumptions is an important defence against poor model building whether in the physical or social sciences. There is also increasing acceptance in democracies worldwide of the need for independent performance audit and ex post evaluation mechanisms of rules and regulations. There has also been a huge increase in the number of extra-judicial appeal and dispute resolution mechanisms in addition to the possibilities of judicial review through courts. All of these mechanisms need to be brought into play at the international level.

Conclusions

The world of international rule-making is an arcane world of its own inhabited by experts and elites of whom as democrats we should be suspicious. It is a world where we can expect to see the increasing use of soft power exercised through soft means. We therefore need a stronger framework for democratic accountability, applicable both to hard law venues and techniques, to soft forms of international rule-making and to a combination of the two. The reality is that despite a long tradition within the political science community of talking about 'multi-level governance' and an even longer tradition among legal scholars in talking about international law-making we still have a basic problem in that we are not able to connect up different levels of rule-making in democratic ways. It would be nice to say with confidence that the EU is leading the way in showing how this can be done. Unfortunately the EU is a model neither of democratic legitimacy nor accountability – or at least, not yet.

I do not wish to pretend that I have the answers. My prescriptions are more about the direction in which we should be going. In my view, in international rule-making we should not lose sight of the importance for established democracies

of democratising those states that remain authoritarian. This would make it more likely that soft power will be exercised in international rule-making in ways that are consonant with rule-making within democracies. In addition, a rule-based framework for the rule-makers would involve a requirement for them to observe higher epistemic standards (both before and after rule-making) and would also require a new breed of independent extra-judicial watchdogs providing for review of impact assessments, performance review, as well as new appeal and disputes settlement procedures. In short, we need rules for the rule-makers.

Abbreviations

FATF	Financial Action Task Force
FSF	Free Software Foundation
IASB	International Accounting Standards Board
IOSCO	International Organization of Securities Commissions
IPCC	Intergovernmental Panel on Climate Change
UNEP	United Nations Environment Programme
WHO	World Health Organization
WMO	World Meteorological Organization
WTO	World Trade Organization

Selected references

- Chayes, Abram & Chayes, Antonia H. 1995. *The New Sovereignty: Compliance with International Regulatory Agreements*. Harvard University Press.
- Florini, Ann. 2003. *The Coming Democracy: New Rules for Running a New World*. Island Press.
- Haas Peter M. 2004. When Does Power Listen to Truth? *Journal of European Public Policy*. Vol.2. No.4. pp569-592.
- Hartlapp, Miriam. 2007. On Enforcement, Management and Persuasion: Different Logics of Implementation Policy in the EU and the ILO. *JCMS*. Vol.45, no.3. pp653-674.
- Held, David & McGraw, Anthony (eds). 2003. *Governing Globalization*. Polity Press.
- Héritier et al. 2007. *New Modes of Governance in the EU*. JPP forthcoming.
- Nye Joseph S. 2002. *The Paradox of American Power*. OUP.
- Reinicke, Wolfgang H. 1997. *Global Public Policy*. *Foreign Affairs*. Vol.76.
- Slaughter, Anne-Marie. 2004. *A New World Order*. Princeton U. Press.
- Thatcher, Mark .1998. The Development of Policy Network Analysis. *Journal of Theoretical Politics*. Vol.10. No.4. pp389-416.
- Vibert, Frank. 2007. *The Rise of the Unelected*. Cambridge University Press.

If you wish to support our work:
Commerzbank Berlin
BIC 100 400 00
Donations account: 266 9661 04
Donation receipts will be issued.

Frank Vibert is Director of the European Policy Forum.

Educated at Exeter College, Oxford he has served as a Senior Advisor at the World Bank and Senior Fellow at the World Institute for Development Economic Research. His latest book, *The Rise of the Unelected: Democracy and the new separation of powers*, is published by Cambridge University Press.